Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

GEORGE S. ALLEN,

Petitioner,

v.

HOWMEDICA LEIBINGER, INC.,
HOWMEDICA, INC. and PFIZER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIAM K. WELLS
Counsel of Record
R. PAUL ZEINEDDIN
RONALD L. SIGWORTH
KENYON & KENYON
1500 K Street
Washington, DC 20005
(202) 220-4200

Attorneys for Petitioner

180986

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

A. Whether a three judge panel of the Federal Circuit can affirm a *sua sponte* district court decision granting summary judgment to Defendants without notice to Plaintiff, contrary to binding precedent, on issues that Defendants conceded to Plaintiff in their own motion papers.

B. Whether the panel can designate its opinion as "non-precedential" thereby enabling the Federal Circuit to act arbitrarily in ignoring a binding Third Circuit precedent as well as Supreme Court precedent prohibiting blatant breaches of due process and insulate its decisions from further scrutiny.

C. The aforementioned questions implicate at least one Constitutional issue, whether a *sua sponte* granting of summary judgment without notice and the Federal Circuit's practice of allowing panels to designate opinions as "non-precedential" violate the Fifth Amendment right to due process and equal protection.

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REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

1. The Federal Circuit's rules and practice regarding "non-precedential" opinions violated Dr. George Allen's rights under the Fifth Amendment.

2. The panel failed to follow well established and binding precedent concerning notice in granting summary judgment which has resulted in an arbitrary and capricious decision that treats similarly situated litigants in an unconstitutionally different manner.

Dr. George S. Allen ("Dr. Allen") prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on February 24, 2003.

OPINIONS AND ORDERS BELOW

The judgment of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") is reported at 54 Fed. Appx. 697 (Fed. Cir. 2003) (per curiam) (unpublished) and is reproduced in the Appendix ("App.") at 1a-2a. The Order of the Federal Circuit denying Dr. Allen's Request for Rehearing and Rehearing *en banc* is unreported and is reproduced in the App. at 21a-22a. The opinion and order of the District Court of Delaware is reproduced in the App. at 3a-20a.

JURISDICTION

The opinion of the United States Court of Appeals for the Federal Circuit was issued on January 16, 2003 and its judgment was issued on the same day. (App. at 1a-2a).

Dr. Allen's combined Petition for Rehearing and Rehearing *en banc* was denied on February 24, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL CIRCUIT RULES INVOLVED

United States Constitution, Fifth Amendment.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Circuit Rule 47.6(b)

> In an opinion or order which is designated as not to be cited as precedent, is one unanimously determined by the panel issuing it, is not adding significantly to the body of law. Any opinion of law so designated must not be employed or cited as precedent. This rule does not preclude assertion of claim preclusion, issue preclusion, judicial estoppel, law of the case, or the like based on a decision of a court designated as non-precedential.

STATEMENT OF THE CASE

1. Introduction

This case reflects the Constitutional violations associated with "non-precedential" decisions of an appellate court flagrantly disregarding binding precedent. This increasingly common practice relegates decisions to the hidden closets of jurisprudence making them in essence private proceedings. This "non-precedential" designation is open to serious abuse by permitting courts to hide bias and arbitrariness from public scrutiny.

The Federal Circuit's practice of designating opinions as "non-precedential" allows the Federal Circuit to selectively prevent review of its opinions while treating the litigants before it in an unconstitutionally arbitrary and unequal manner. This is particularly so here where summary judgment was granted to the Defendants Pfizer, Inc. ("Pfizer"), Howmedica, Inc. and Howmedica Leibinger, Inc. ("Leibinger")[1] in connection with their illegal acts in using a patent they knew was invalid in a predatory manner to keep the Plaintiff and its potential customers out of the marketplace. Summary judgment was granted without notice to non-movant of the issue on which the court relied and, for purposes of Defendants' motion, the issue had been conceded to the Plaintiff. The decision of the district court was reached in a flagrant disregard of the binding Third Circuit precedent which proscribes summary judgment in this fashion.

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1. Leibinger GmbH was a commonly owned German entity during the relevant time period and was the technical owner of the '457 patent. "Leibinger" is used herein to refer both to the German and U.S. companies.

The Federal Circuit's practice in sustaining such conduct violates the Fifth Amendment's right to due process and equal protection by its arbitrary treatment of similarly situated litigants. *See, e.g., Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("when an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the equal protection clause"); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991) ("when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others" similarly situated.)

This case presents another instance which demonstrates the need for this Court to monitor the practices of the Federal Circuit. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 122 S. Ct. 1889, 1898 (2002) (Stevens, J., concurring in part). In *Holmes Group*, Justice Stevens recognized the duty of this Court to prevent the Federal Circuit from developing an "institutional bias":

> An occasional conflict in decisions may be useful in identifying questions that merit this Court's attention. Moreover, occasional decisions by courts with broader jurisdiction will provide an anecdote to the risk that the specialized court may develop an institutional bias. (Emphasis added).

Id. at 1898. Also, in *Festo Corp. v. Shoketsu Kinzoku Kogyu Kabushiki Co.*, 122 S. Ct. 1831, 1841 (2002), this Court admonished the Federal Circuit for ignoring this Court's precedent and thereby disrupting the subtle expectation of the inventing community.

2. Proceedings Below

Plaintiff Dr. George S. Allen, Chairman of the Neurosurgery Department of Vanderbilt University, is a nationally recognized neurosurgeon and inventor in the field of image guided surgery. Image guided surgery is a relatively new field involving hardware and software that is utilized to create three dimensional images of the anatomy for surgical and diagnostic purposes, making surgery safer, more effective and cheaper for both the surgeon and the patient. A critical component of this image guided surgery system, along with the software, is a "fiducial marker" system fixed to the anatomy to show precise three dimensional position or points within the patient, for example in the interior reaches of the brain.

Although Dr. Allen had over 15 patents in the field of image guided surgery, Defendants in this case, Leibinger and Pfizer, Inc., were able to obtain a patent which ostensibly covered Dr. Allen's fiducial markers, as well as their own. This U.S. Patent No. 5,394,457 ("Leibinger '457 patent") was then used to prevent Dr. Allen and his licensee, Picker International, Inc. ("Picker"), from introducing Dr. Allen's superior Acustar® "fiducial marker" system to the market.

In 1995, Dr. Allen learned that the Leibinger '457 patent was and had always been invalid and that Leibinger and Pfizer had known of defects in their patent since 1994. Nevertheless, Leibinger and its parent Pfizer used this invalid patent to maintain a monopoly position in the market, as Dr. Allen was the only other potential competitor in the fixed fiducial market. Because of the predatory practices of the Defendants, Dr. Allen brought an action on October 28, 1998, alleging state causes of action for spreading false and misleading

statements about their patent position in the marketplace and for tortious interference with a contractual relationship with third party Picker. Dr. Allen amended his Complaint on July 16, 1999, adding a federal cause of action under the Lanham Act.

Dr. Allen was forced to bring this action because Defendants' acts foreclosed competition in the medical device field to which Dr. Allen sought entry. In furtherance of these acts, Leibinger and Pfizer procured (through sister company Leibinger GmbH), maintained and publicly promoted a patent they knew to be invalid. As a direct consequence of Defendants' conduct, customers refused to buy technology from Dr. Allen for fear of patent litigation from any entity associated with Pfizer who is a notorious litigant.

Prior to bringing the cause of action, Dr. Allen had filed a patent application with the U.S. Patent and Trademark Office ("PTO") directed to fiducial markers he intended to sell himself or through licensees. During the course of the patent application process, Dr. Allen learned of the Leibinger '457 patent which ostensibly covered his markers. An interference was eventually declared by the PTO between the Allen patent application and the '457 patent that had issued to Leibinger. Despite knowledge that its patent was invalid, Leibinger asserted the '457 patent against the Allen patent application in an effort to deprive Dr. Allen and the public from products which would otherwise be in the public domain. It was during the course of the interference when Dr. Allen eventually learned that Defendants knew during all relevant times that the '457 patent was invalid. A German revocation proceeding was discovered which exposed the invalidity of the corresponding German patent based on a prior art reference cited in that proceeding. (App. at 5a-6a; Ldg at L-12 - L-13).

Although the invalidating prior art had been made available to Leibinger prior to the issuance of the '457 patent, that information was not submitted to the U.S. patent examiner pursuant to applicant's duty to do so under 37 C.F.R. 1.56. Similarly, during the course of the interference, Defendants made overt, explicit and conscious efforts to keep this reference away from the Board of Appeals and Patent Interferences. (Ldg at L-13 - L-14; App. at 7a-8a). After it became so apparent that its position was indefensible, Defendants finally argued to the PTO that claims of their own patent were invalid over the same reference that invalidated the corresponding German patent. Despite this admission in the interference, Defendants continued to promote their patent position in the public marketplace, pay the maintenance fee and keep its patent enforceable in an effort to restrain competition. The interference lasted from 1996 until a final decision in December 2000 when the Board of Patent Appeals and Interferences found that the entire patent was invalid and that Defendants had presented no basis for distinguishing any of the claims over the prior art.

Even though at the interference all 22 claims of its patent were declared invalid and there had been serious questions of inequitable conduct raised, the Defendants moved for summary judgment on all counts while conceding their own "bad faith." Three major issues that had to be resolved before summary judgment could be granted: (1) whether the statements and other conduct in the marketplace were "misleading" with respect to their patent position, (2) whether the defendants acted in "bad faith" with the knowledge that their statements were false or misleading, and (3) whether "literal falsity" existed with respect to their statements that their product was covered by a U.S. patent. Defendants filed

a summary judgment motion on "literal falsity" only, and did not move on any "bad faith" issues or on the "misleading" cause of action.

Dr. Allen cross-moved on the "literal falsity" issue as well while preserving his right to trial on the "misleading" conduct and "bad faith" associated therewith. In an opposition brief, Defendants acknowledged that Dr. Allen had a colorable claim on the "misleading" elements of his cause of action, stating specifically, "Allen could argue (but does not) that the statements were literally true but misleading due to Defendants' alleged knowledge that the '457 patent was invalid." (Ldg at L-5). The trial court confirmed that there were issues of fact with regard to certain misleading statements, particularly the statement that there was "no problem" with the patent in dealing with one of its customers. (App. at 16a). Similarly, the district court found that the Defendants knew that there were various problems with the patent at the time the statements were made. Such knowledge clearly constitutes "bad faith." Nevertheless, the court granted summary judgment to the Defendants without giving Dr. Allen the slightest notice that it was ignoring Defendants' admissions and concessions concerning "bad faith" and that Dr. Allen should have come forth with all of his evidence on Defendants' misconduct, including "bad faith."

With regard to the "bad faith" issue in general, the Defendants conceded the issue in their own motion for summary judgment which related to the other elements concerning Plaintiff's cause of action. Defendants expressly

disclaimed reliance on the "bad faith" issue when they said in their motion papers

> Allen's accusations regarding bad faith conduct . . . are not relevant to Defendants' motion.

(Ldg at L-3). Defendants further *assumed for the purposes of their motion that they had the requisite bad faith.* (Ldg at L-2). Thus Dr. Allen had no notice that the "bad faith" associated with the "misleading" nature of the statements or that their "misleading conduct" in general was at issue in the case for summary judgment purposes. Quite the contrary, as they had been conceded, Dr. Allen was on notice that the issues were not contested by Defendants.

Nevertheless, the trial court found for the purposes of granting summary judgment that the Plaintiff had not submitted the requisite evidence of "bad faith", and that consequently Defendants were entitled to summary judgment on all the causes of action.

Plaintiff Dr. Allen subsequently appealed the decision based on admissions and concessions made by the Defendants and the district court's own findings that there were issues of fact with regard to their "bad faith" and "misleading" conduct. (Ldg at L-17 - L-30). On appeal to the Court of Appeals for the Federal Circuit, Plaintiff noted to the Federal Circuit that Defendants admitted that they had conceded the issue in their brief. Nevertheless, the Federal Circuit in a non-precedential *per curiam* decision affirmed the decision below, that there was no "bad faith." (App. at 1a-2a). The finding by the district court that there were issues of fact with respect to the "misleading" statements and conduct were simply not addressed.

REASONS FOR GRANTING THE PETITION

1. The Panel Majority Failed to Follow Well Established Precedent That Summary Judgment Could Not Be Granted Without Notice to Plaintiff

A. The Federal Circuit In this Case Affirmed the District Court's Decision to Look Beyond the Issues Before It in Granting Summary Judgment *Sua Sponte* Without Notice to Dr. Allen

The District Court for the District of Delaware, whence this case came, is required to apply the law of the Third Circuit on procedural issues surrounding summary judgment. Since the Defendants never moved on summary judgment on "bad faith" or the "misleading" nature of their conduct, the only way the court could reach the issue was *sua sponte*. As to the propriety of a court raising such an issue on its own, the Federal Circuit is compelled to follow the law of the regional circuit from which the case was appealed, in this case the Third Circuit. *See, e.g., Massey v. Del Laboratories, Inc.*, 118 F.3d 1568, 1572 (Fed. Cir. 1997) (applying Ninth Circuit law regarding the propriety of summary judgment granted *sua sponte*).

Under Third Circuit law a district court may not grant summary judgment *sua sponte* to a non-moving party "without first placing the [other] party on notice that the court is considering" such a judgment. *Chambers Development Co. v. Passaic County Utilities Authority*, 62 F.3d 582, 584, n. 5 (3d Cir. 1995) (reversing summary judgment against moving party and for non-moving party). The court "must also provide the party with an opportunity to present relevant evidence in opposition to that motion." *Id. See also Celotex*

Corp. v. Catrett, 477 U.S. 317, 326 (1986) (summary judgment may be granted *sua sponte* only if "the losing party was on notice that she had to come forward with all of her evidence"); *Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 910 (3d Cir. 1994) (reversing summary judgment because "a district court may not grant summary judgment *sua sponte* unless the court gives notice and an opportunity to oppose summary judgment.").

As the district court provided Dr. Allen with neither notice nor an opportunity to present evidence in response to such motion, it did not comply with the requirements of the Third Circuit, nor Supreme Court precedent, for granting summary judgment *sua sponte*. Indeed, Defendants had informed Dr. Allen that they had conceded the "bad faith" issue and that they were not moving on Dr. Allen's "misleading" cause of action. Consequently, Dr. Allen had no reason to submit all of his evidence on these issues.

Under Rule 56 of the Federal Rules of Civil Procedure, a defendant moving for summary judgment has the burden of demonstrating that there is no genuine issue of any material fact concerning an essential element of the plaintiff/non-movant's case. Even *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) states "the plaintiff/non-movant bears the burden of responding *only after* the defendant/moving party has met its burden of coming forward to show the absence of evidence to support one or more essential elements of the non-movant's case." *Id.* at 324-25, 328, 330-32. The holding of the Court of Appeals for the Federal Circuit affirming the trial court on this issue is a direct affront to *Celotex* and completely contrary and at odds with *Massey* and *Chambers*, precedent that that court is constrained to follow.

B. In Another "Non-Precedential" Decision, the Federal Circuit Vacated a District Court Decision Where Litigants Were In The Identical Posture on Summary Judgment as Dr. Allen and the Defendants in This Case

The Federal Circuit's non-precedential decision here directly conflicts with its non-precedential opinion in *Bemis Manufacturing Co. v. Dornoch Medical Sys., Inc.*, 21 Fed. Appx. 930 (Fed. Cir. 2001) (unpublished), thereby injecting arbitrariness into the rule of law. Unlike its *per curiam* opinion affirming the district court's grant of summary judgment against Dr. Allen, the Federal Circuit in *Bemis* vacated a finding of summary judgment "because the district court [improperly] granted summary judgment *sua sponte* to the non-movant on a ground for which proper notice and a fair opportunity to present evidence was not given". *Id.* at 937. The Federal Circuit found that the district court in *Bemis,* similar to the *Massey* court, erroneously granted summary judgment against non-movant "on grounds argued in the defendant's opposition brief, rather than in the defendant's motion for summary judgment." *Id.* at 936.

Specifically in *Bemis,* the district court granted summary judgment of non-infringement against plaintiff even though the defendant never moved for judgment on that issue. The plaintiff moved for summary judgment of patent infringement and defendant moved solely for summary judgment of patent invalidity. The district court, "drawing from the defendant's arguments in its opposition brief written in response to the plaintiff's motion," awarded summary judgment on an issue not raised in defendant's motion. *Id.* at 936. The Federal Circuit vacated, finding that plaintiff Bemis was not afforded proper notice and a fair opportunity

to be heard. It further stated that "the determination of whether the district court offered Bemis proper notice . . . turns not on Bemis's surprise that the issue was raised, but more so on Bemis's surprise that the district court would consider granting summary judgment on that ground." *Id.* at 936 (citing *Massey*, 118 F.3d at 1573).

However, the Federal Circuit reached a completely opposite finding here–although Dr. Allen's situation was no different than the appellant in *Bemis*. Like the non-movant respondent in *Bemis*, Defendants here never moved on (and in fact, conceded) the issue upon which the court granted summary judgment. Like the district court in *Bemis*, the district court here never placed Dr. Allen on notice that an issue (bad faith) was a potential basis for Defendants' summary judgment motion. Like the appellant in *Bemis*, Dr. Allen here was surprised that the district court considered granting summary judgment on that issue. However, ***unlike*** the Federal Circuit panel in *Bemis*, the Federal Circuit panel here did not vacate the district court's grant of summary judgement.

Why did the Federal Circuit treat appellant in *Bemis* differently than Dr. Allen? No one will know because the Federal Circuit filed a *per curiam* non-precedential opinion. By deeming both its opinions here and in *Bemis* as non-precedential, the Federal Circuit plunges the law in confusion. In effect, the Federal Circuit's standards in granting summary judgment under Fed. R. Civ. P. 56 have become wholly arbitrary.

One can speculate that the "pro-patent" institutional bias of the Federal Circuit may be a contributing factor to the conflicting decisions. By vacating the summary judgment

against the plaintiff patentee in *Bemis*, the Federal Circuit remanded the case to allow the patentee to continue its infringement suit. Similarly (but more egregiously), the Federal Circuit here sustained a holding of no bad faith that permitted Defendants, major international medical device and pharmaceutical companies, to promote a patent that they knew was defective. Although ostensibly protecting Pfizer's and Leibinger's illegally obtained patent position, these actions stunt the growth of new technology by real inventors.

2. The Arbitrary Selection of Opinions as Non-precedential Treats Litigants Unequally in Violation of the Fifth Amendment

The Federal Circuit's use of "non-precedential" designation violates the Fifth Amendment right to equal protection and due process under the law. It provides unequal treatment to similarly situated litigants. This is particularly so where, as here, the Federal Circuit's opinion is contrary to established precedent and, by the designation of an opinion as "non-precedential," effectively and arbitrarily destroys the opportunity for further review, and provides the Federal Circuit with the ability to hide its decision from scrutiny of future litigants, the bar, scholars and other courts.

It has always been part of due process and Supreme Court jurisprudence that the legal system treat all persons similarly situated alike. *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (A classification must "be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike.") (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971)).

Under Fed. Cir. Rule 47.6(b), the appellate court can designate its opinion or order as non-precedential if it is determined by the panel issuing it as not "adding significantly to the body of law." Although the court has not stated any reason other than the rule itself why an opinion should be designated non-precedential, there is a strong implication that the district court decision applied the correct legal principles in the correct way. In this particular case, the body of law and the decision of the district court below are in no way supported by Constitutional principles or precedent of any relevant court. Rather, it is contrary to precedent, and to say it adds nothing to the record is to make it stand for something that it does not, *i.e.*, that it is consistent with due process and treats litigants equally.

Furthermore, it detracts from the ability of the bar to advise clients and other litigants who may appear before the court. What does one tell a client when the Federal Circuit has affirmed a decision that is totally contrary to the Rules of Civil Procedure, due process, binding precedent and the rules of the Supreme Court? Parties and their counsel should be able to rely on these institutional principles in defining their conduct both in and out of the courts. The only value in designating a decision as "non-precedential" is that it protects the Federal Circuit when it acts in an arbitrary manner by hiding its review.

In the past, this Court has not hesitated to strike local rules that arbitrarily discriminate against certain litigants. In *Frazier v. Heebe*, 482 U.S. 641 (1987), the Court in exercising its inherent supervisory authority under 28 U.S.C. § 2072 struck down a lower court's local rule which arbitrarily discriminated against non-resident bar members:

> A District Court's discretion in promulgating local rules is not without limits. This Court may exercise

> its inherent supervisory power to insure that these local rules are consistent with the "principles of right and justice." (Citation omitted).

Id. at 645 (emphasis added).

Federal Circuit Rule 47.6(b) should be stricken in this case such that no court can hide its mistakes and treat litigants arbitrarily. The dangers created are self-evident. This practice continues to foreclose proper appellate review of opinions, resulting in less stability and predictability, and promotes confusion among the bar. It permits the court to "create an underground body of law good for one place and time only" and that courts may "choose for themselves, from among all the cases they decide, those that they will follow in the future and those that they need not." *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000), *vacating as moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000) (*en banc*).[2] "This discretion is completely inconsistent with the doctrine of precedent." *Anastasoff*, 223 F.3d at 905.

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2. The Eighth Circuit in *Anastasoff* is one of several appellate courts that have questioned the constitutionality of non-precedential opinions under Article III of the Constitution rather than the Fifth Amendment. In *Anastasoff*, a panel of the Eighth Circuit had ruled the practice of declaring opinions as non-precedential unconstitutional; however, the *en banc* court vacated this holding on mootness grounds. *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), *vacating as moot*, 235 F.3d 1054 (8th Cir. 2000) (*en banc*).

CONCLUSION

Secret jurisprudence offers a real potential for undermining the predictability and consistency in our common law traditions. The danger of arbitrary decisions affecting unfairly similarly-situated litigants is manifest from the different results in this case compared with *Bemis*. It will only get worse unless this Court addresses the abuses associated with non-precedential decisions and their due process implications. For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

WILLIAM K. WELLS
Counsel of Record
R. PAUL ZEINEDDIN
RONALD L. SIGWORTH
KENYON & KENYON
1500 K Street
Washington, DC 20005
(202) 220-4200

Attorneys for Petitioner